2017 IL App (1st) 170172-U

THIRD DIVISION
October 25, 2017

No. 1-17-0172

IN THE APPELLATE
COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

U.S. BANK TRUST, N.A., as Trustee for LSF9 Master Participation Trust,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 14 CH 15176
MARK JOUZAPAITIS,	)	
Defendant-Appellant	)	
(PNC Bank, National Association; Unknown Owners and Nonrecord Claimants,	)	The Honorable Robert Senechalle, Jr.
Defendants).	)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

HELD: Trial court properly entered summary judgment in favor of plaintiff bank in mortgage foreclosure action where defendant admitted he signed the note attached to the complaint, showing it was the rightful legal holder of the note, and defendant failed to otherwise dispute this.

¶ 1 Following the entry of summary judgment in favor of plaintiff-appellee U.S. Bank Trust,

N.A., as Trustee for LSF9 Master Participation Trust (plaintiff) with respect to its mortgage foreclosure suit against defendant-appellant Mark Jouzapaitis (Jouzapaitis),[1] the property at issue was sold and its sale was confirmed. Jouzapaitis appeals, *pro se*, making myriad contentions on appeal, all primarily attacking plaintiff's status as "the rightful legal holder of" the note and its ability to enforce that note in this cause; he insists genuine issues of material fact remain and, thus, that the trial court erred and abused its discretion in entering its judgment. He asks that "all findings and orders of the [t]rial [c]ourt [be] reversed or vacated." For the following reasons, we affirm.

¶ 2 BACKGROUND

¶ 3 On September 19, 2014, plaintiff[2] filed a complaint to foreclose mortgage on property located at 13035 Parker Road in Lemont, Illinois. Plaintiff attached to its complaint a copy of the mortgage documents signed by Jouzapaitis and a copy of the promissory note indorsed in blank by Jouzapaitis.

¶ 4 Before answering the complaint, and in response to the initial notice of default and intent

[1]We note that, although the Notice of Appeal in this cause lists "PNC Bank, National Association and Unknown Owners and Nonrecord Claimants" as defendants-appellants, these entities are not parties to this appeal. It is clear from the record that only Jouzapaitis is appealing the trial court's grant of summary judgment here: in two orders issued on July 29, 2016, the trial court dismissed Unknown Owners and Nonrecord Claimants as party defendants, and it specified that summary judgment and judgment of foreclosure and sale were to be entered against only defendant Jouzapaitis. We have thus corrected the caption of this cause accordingly to properly identify the parties and their positions.

[2]For the record, JPMorgan Chase Bank was the initial plaintiff in this cause, filing the complaint to foreclose mortgage on the property at issue. Plaintiff U.S. Bank, however, was later substituted after defenses were disposed of but before judgment was entered. As this has no impact upon Jouzapaitis' cause, we choose, for the sake of simplicity, to refer only to U.S. Bank as plaintiff herein.

to accelerate he received from plaintiff, Jouzapaitis sent several "demand letters" to various members of plaintiff's staff seeking proof that plaintiff was entitled to enforce the note and was not just a possessor of the note. Unsatisfied with the responses he received to his letters, Jouzapaitis filed an answer to plaintiff's complaint.[3] In his answer, Jouzapaitis admitted that he was the maker of the note that was attached to plaintiff's complaint and that he had signed to secure the note with the mortgage that was attached to the complaint. However, he insisted he had no knowledge of the indorsement and denied that plaintiff was entitled to enforce the note. He then pled six affirmative defenses, asserting that plaintiff failed to plead injury, that plaintiff failed to plead it was entitled to enforce the note, that plaintiff failed to plead it was the holder of the note, that he did not have any contractual relationship with plaintiff, that he could not determine the note's authenticity, and he disputed that plaintiff was the mortgagee.

¶ 5 Plaintiff moved to strike Jouzapaitis' affirmative defenses, arguing that they were not well pled and that it had properly shown its capacity to foreclose on the note and mortgage. Jouzapaitis responded, arguing his defenses were proper and attaching various exhibits. The exhibits consisted of the letters he had sent to plaintiff's personnel, the responses he allegedly received to those letters, and other letters he had sent seeking more information about the loan. Following a hearing, the trial court struck Jouzapaitis' first defense with prejudice and struck his remaining defenses with leave to replead.

¶ 6 Jouzapaitis filed amended affirmative defenses. His first and second amended defenses

[3]In addition to appearing *pro se* on appeal, Jouzapaitis appeared *pro se* in the trial court throughout this litigation.

asserted that plaintiff failed to demand a default via the concept of presentment through the Uniform Commercial Code (UCC). His remaining affirmative defenses repled those alleged earlier, asserting that plaintiff failed to establish its right to enforce the note. Plaintiff again moved to strike Jouzapaitis' affirmative defenses as insufficient; plaintiff also moved for judgment on the pleadings pursuant to section 2-615(e) of the Code of Civil Procedure (735 ILCS 5/20615(e) (West 2014)) with respect to his new UCC presentment defenses, stating that his right to presentment was waived with the note, which it had attached to its complaint. In his response to plaintiff's motion, Jouzapaitis argued that plaintiff's personnel, in response to his letters, failed to prove its rights in the note and, thus, he did not owe anything under that instrument to plaintiff. He also argued that even if he had waived his right to presentment, plaintiff still failed to establish its rights in the note, thereby effecting a challenge to plaintiff's ability to enforce the note.

¶ 7 At a hearing on this motion, plaintiff presented the original note in open court; the trial court reviewed the note and allowed Jouzapaitis to do the same. The court then entered judgment on the pleadings in favor of plaintiff with respect to Jouzapaitis' first and second amended affirmative defenses, finding that Jouzapaitis waived his right to demand presentment by making the note. The court also struck Jouzapaitis' remaining defenses and dismissed them with prejudice, finding that plaintiff has standing and the ability to enforce the note which it had attached to its complaint.

¶ 8 Plaintiff then moved for summary judgment and judgment for foreclosure and sale of the property. Jouzapaitis filed a response to plaintiff's motion, as well as an affidavit and various

motions of his own, including a motion to strike the order striking his affirmative defenses, a motion to strike the note as an exhibit to the complaint, a motion to strike plaintiff's prove-up affidavit, a request for judicial notice, and a "UCC argument" supplement to his response. In these, Jouzapaitis alleged that during discovery in this cause, and in response to his demand letters, several individuals employed by plaintiff sent him copies of the note–a copy he asserted contained a signature purported to be his but that appeared different than his signature on the note attached to plaintiff's complaint. In addition to insisting that plaintiff failed to lay proper foundation for its business records, Jouzapaitis alleged that there were two different notes and argued that, therefore, plaintiff had failed to meet its burden that it was entitled to execute the note and that summary judgment should not be granted. Plaintiff's reply in support of its motion for summary judgment averred that its affidavit properly laid foundation for its business records and established that Jouzapaitis had defaulted on the loan. It also averred that Jouzapaitis' arguments about the differences in signature on the note were meritless because it had produced the original note in open court, were contradictory to his prior sworn statements that he was the maker of the note, and he could not otherwise meet his burden to show that he had not signed it.

¶ 9 At a hearing, the trial court began by addressing Jouzapaitis' various motions, first among them his motion to strike the note that was attached to plaintiff's complaint. Reviewing the record, the court noted that Jouzapaitis had long ago admitted that he was the maker of the note, that he executed the note, and that the copy of the note attached to the complaint was true and correct. The court acknowledged that Jouzapaitis had provided it with enlarged copies of the note attached to the complaint and the note he alleged was provided to him during discovery in

an effort for the court to find that they are not identical so it would, in turn, strike the note attached to the complaint, rendering him not liable. The court, however, found that "there's no evidence that the signatures are different," and it reminded Jouzapaitis that he admitted that he had signed the note attached to the complaint. Thus, in denying his motion to strike, the court stated that:

> "I have no evidence that the note that's attached to the complaint that you've admitted that you signed *** is anything other than what it purports to be.
>
> ***
>
> I don't have any evidence that there's a different version of the note ***.
>
> ***
>
> I understand you're telling me that *** the signatures to you don't look the same, but I have no evidence of that. Both of them look like your signature. I can't tell that the signatures are different."

Additionally, the court denied Jouzapaitis' other motions, stating he had not provided any new evidence to merit reconsideration of the striking of his affirmative defenses and that the prove-up affidavit provided by plaintiff was sufficient and admissible. Then, in ruling on plaintiff's motion, the court held that "there's not a genuine issue of material fact" and granted summary judgment in plaintiff's favor. Jouzapaitis filed a motion to reconsider, again arguing plaintiff's failure to make proper presentment of the note and disputing its legal status as the holder of the note in light of the differences in signature he presented. The trial court denied his motion to reconsider.

¶ 10 Eventually, a judicial sale of the property took place, with plaintiff as the successful bidder. Plaintiff moved to confirm the sale, and the trial court granted its motion.

¶ 11 ANALYSIS

¶ 12 Jouzapaitis appeals from the trial court's order striking his affirmative defenses, its grant of summary judgment in favor of plaintiff, its denial of his motion to reconsider and its order confirming judicial sale of the property. His main contention, incorporating these orders he appeals from, is that a genuine issue of material fact remains, namely, the purported differences in his signature on the note attached to the complaint and on the note he allegedly received in response to this letters during discovery. He insists that, because of this discrepancy, the trial court erred in granting summary judgment to plaintiff. We disagree.

¶ 13 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See *Morris v. Margulis*, 197 Ill. 2d 28, 35 (2001); *Purtill v. Hess*, 111 Ill. 2d 229, 240-44 (1986); accord *Parkway Bank and Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 14. While this relief has been called a "drastic measure," it is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35, quoting *Purtill*, 111 Ill. 2d at 240; accord *Korzen*, 2013 IL App (1st) 130380, ¶ 14. Indeed, summary judgment should not be granted where a reasonable person could draw divergent inferences from undisputed facts. See *Korzen*, 2013 IL App (1st) 130380, ¶ 14. However, at the summary judgment stage of a suit, the nonmoving party must present the

evidence he has; " 'it is " 'the put up or shut up moment in a lawsuit.' " ' " *Korzen*, 2013 IL App (1st) 130380, ¶ 14,(quoting *Eberts v. Goderstad*, 569 F.3d 757, 767 (7th Cir. 2009) (quoting *Koszola v. Board of Education of the City of Chicago*, 385 F.3d 1104, 1111 (7th Cir. 2004), quoting *Schacht v. Wisconsin Department of Corrections*, 175 F.3d 497, 504 (7th Cir. 1999))). Appellate review of a trial court's grant of summary judgment is *de novo* (see *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992)), and reversal will occur only if we find that a genuine issue of material fact exists (see *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988)).

¶ 14 We find that there was no genuine issue of material fact remaining in this cause. This is because, at the "put up or shut up moment" of this lawsuit, Jouzapaitis failed to present any evidence to dispute his prior admission that he signed the note securing the mortgage on the property which plaintiff had attached to its complaint.

¶ 15 It is clear in this cause that plaintiff established its interest in the note. Contrary to Jouzapaitis' insistence, it was his burden to prove that plaintiff does not have standing, *i.e.*, that it did not have the capacity to execute the note. See *Korzen*, 2013 IL App (1st) 130380, ¶ 24 (standing is an affirmative defense). It was not plaintiff's burden to prove it does have standing. See *Korzen*, 2013 IL App (1st) 130380, ¶ 24; accord *Mortgage Electronic Registration Systems, Inc. v. Barnes*, 406 Ill. App. 3d 1, 7 (2010). Moreover, it is well established that the mere fact that a plaintiff attaches a copy of the note to the complaint is, itself, *prima facie* evidence that the plaintiff owns the note.

¶ 16 Here, plaintiff attached a copy of the note indorsed in blank to its complaint. Therefore,

it made a *prima facie* showing that it was the owner of the note and the accompanying mortgage on the property at issue and, accordingly, that it had standing and the capacity to execute the note. In addition, the record demonstrates that plaintiff also presented the original note in open court; the trial court acknowledged this and allowed Jouzapaitis to review it. Plaintiff was not required to do this, as in Illinois, the production of the original note in open court, rather than simply relying on the copy attached to the complaint, is not a required element of proof in order to commence a foreclosure action. See *Korzen*, 2013 IL App (1st) 130380, ¶ 32 (citing 735 ILCS 5/15-1506(b) (West 2010)); accord *First Federal Savings & Loan Ass'n v. Chicago Title & Trust Co.*, 155 Ill. App. 3d 664, 665-67 (1987); see also *Rosestone Investments, LLC v. Garner*, 2013 IL App (1st) 123422, ¶ 26. Yet, plaintiff did so, further establishing its standing here as the holder of the note.

¶ 17 In the face of this proof, Jouzapaitis attempted to argue that there was a difference in his signature as it appeared on the note plaintiff attached to its complaint to foreclose compared to copies of a note he alleged he received from plaintiff's personnel in answer to letters he wrote them as part of "discovery" in this cause. His argument fails, in several respects.

¶ 18 First, and most significant here, is the fact that Jouzapaitis admitted at the outset of this cause that he signed the note. He never once denied that the note attached to the complaint was not a true and correct copy of his indebtedness. Rather, not only did he never deny it, but he affirmatively admitted in his answer that he had signed that note and incurred the indebtedness that accompanied it. And, he repeated the same in his amended defenses, when he stated that he was the maker of the note. This amounted to a judicial admission that was binding upon him.

See *Konstant Products, Inc. v. Liberty Mutual Fire Insurance Co.*, 401 Ill. App. 3d 83, 86 (2010).

¶ 19 Moreover, Jouzapaitis' claims of copies of a note he received in response to letters he sent to plaintiff's personnel are just that–claims. They remain wholly unsubstantiated. Jouzapaitis' first mention of these came in his affidavit in response to plaintiff's motion for summary judgment. He never once, before that point, asserted any affirmative defense, such as forgery, that would have supported his claim. Moreover, his claim in his affidavit and the copies of this "second" note he insists existed were not business records nor did they comprise any form of reliable evidence; he never introduced to the court who the people were that he alleges provided him with the other note, nor did he depose them, nor did he do anything legally to support or prove his claim in this respect. And, even with his allegation of the existence of a "second" note, he never argued that he did not sign the "second" note; he simply stated he could not remember if he had. The trial court was presented with both notes, it examined them closely and it concluded that, not only did Jouzapaitis fail to meet his burden because he provided "no evidence" that they were different, but he also failed to meet his burden because the signatures looked the same.

¶ 20 Furthermore, the timing of Jouzapaitis' raising of this issue was completely improper. Jouzapatis waited until his response to plaintiff's motion for summary judgment to argue that two different notes existed. Section 1504(c) of the Illinois Mortgage Foreclosure Law sets forth several deemed allegations that present standard, usually noncontroversial facts common to all mortgage foreclosure situations. See *Wells Fargo Bank, N.A. v. Simpson*, 2015 IL App (1st)

142925, ¶ 44; accord *Korzen*, 2013 IL App (1st) 130380, ¶ 43 (if a complaint for foreclosure "is 'substantially' in the specified statutory form, the allegations in the complaint 'are deemed and construed' to also include 12 more statutorily specified allegations" set forth in section 1504(c)). "A foreclosure defendant who does not specifically deny them has admitted them even though they are not specifically set forth in the complaint." *Simpson*, 2015 IL App (1st) 142925, ¶ 44; accord *Korzen*, 2013 IL App (1st) 130380, ¶ 43. One of these deemed allegations is that "the exhibits attached [to the complaint] are true and correct copies of the mortgage and note." 735 ILCS 5/15-1504(c)(2) (West 2010); see *Korzen*, 2013 IL App (1st) 130380, ¶ 43.

¶ 21 Accordingly, here, if Jouzapaitis wanted to refute that the note plaintiff attached to its complaint was the proper note, he was required to deny this otherwise deemed allegation in his answer to the complaint. As we have already discussed, he did not deny this allegation but, instead, and in direct contradistinction, he admitted in his answer that he did sign that note. Thus, the deemed allegation that the note attached to the complaint was a true and correct copy of the note was, also, admitted. See *Simpson*, 2015 IL App (1st) 142925, ¶ 49 ("the failure to deny a deemed allegation in an answer to a mortgage foreclosure complaint must be given its normal and usual significance, resulting in the allegation being admitted"); see also *Korzen*, 2013 IL App (1st) 130380, ¶ 43 ("[b]y failing to deny these presumed allegations [including 1504(c)(2)], defendants admitted the authenticity of the copy of the mortgage and note attached to the complaint").

¶ 22 Jouzapaitis makes much of the fact that he did not receive the copies of the alleged "second" note until after he had answered plaintiff's complaint. However, this does not absolve

him from following proper procedure. The failure to assert a defense in an answer or to file a cross-motion for summary judgment raising the defense waives that defense, and it cannot be raised later in the course of litigation in response to an opposing party's motion for summary judgment. See *Aurora Bank FSB v. Perry*, 2015 IL App (3d) 130673, ¶ 20. In other words, Jouzapaitis could not raise the issue about the differences in signature at summary judgment because he never raised it in his answer. When he allegedly discovered the differences, he should have amended his answer, which he never did. Moreover, by the time plaintiff filed its motion for summary judgment, Jouzapaitis had no operative affirmative defenses left; they had all been struck and dismissed and, again, he had never denied the validity of his signature on the note attached to the complaint but, rather, affirmed that it was his. Thus, his attempt to defeat plaintiff's claim by raising an alleged difference in signature for the first time in response to its motion for summary judgment was improper. See, *e.g.*, *Perry*, 2015 IL App (3d) 130673, ¶ 20.

¶ 23 As a final matter, we address Jouzapaitis' argument regarding presentment. He again attacks plaintiff's interest in the note, this time by arguing that it lacked the ability to foreclose here because it did not make proper presentment under the UCC (810 ILCS 5/1-101 *et seq*. (West 2010)). However, there is no viable issue concerning presentment in this appeal. As evidenced by the mortgage Jouzapaitis signed, which is contained in the record here, he affirmatively waived his "rights of presentment and notice of dishonor." Thus, he cannot now claim a defect in plaintiff's interest based on a lack of presentment. Moreover, plaintiff was not required to comply with presentment in order to proceed on its foreclosure case. As we have already discussed, pursuant to the Illinois Mortgage Foreclosure Law, a plaintiff seeking

foreclosure is not required to produce the original note, or any specific documentation demonstrating that it owns the note or the right to foreclose on the mortgage, other than the copy of the mortgage and note attached to the complaint. See *Korzen*, 2013 IL App (1st) 130380, ¶ 26 (citing *First Federal*, 155 Ill. App. 3d at 665-67). Accordingly, Jouzapaitis' arguments regarding presentment must fail, as he waived any right he might have had to this pursuant to the clauses in the mortgage he signed, and by the fact that presentment of the original note is simply not a requirement for a foreclosure cause to proceed in the first place.

¶ 24 In sum, no genuine issue of material fact remained in this mortgage foreclosure cause of action and, thus, summary judgment in favor of plaintiff was proper. By plaintiff attaching a copy of the note and mortgage to the complaint, and by Jouzapaitis admitting in his answer that he signed that note, an admission which he never amended to effect a denial, it is clear that plaintiff was the legal holder of the note with standing to effectuate the foreclosure here.

¶ 25 CONCLUSION

¶ 26 Accordingly, for all the foregoing reasons, we affirm the judgment of the trial court.

¶ 27 Affirmed.